class,[34] yet since the broader meaning undoubtedly includes taxicabs,[35] the latter construction should have been adopted in the principal case because of the settled rule that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer.[36] It appears, therefore, that the decision in the principal case cannot be supported upon any ground.

RIGHT OF A SIMPLE CONTRACT CREDITOR TO SECURE THE APPOINTMENT OF A RECEIVER. The jurisdiction to grant a receivership is one of the highest and most drastic powers of the chancery court, and is exercised with the utmost caution.[1] Relief is granted only where the facts show inadequacy of legal remedy and the necessity of summary relief.[2] For, since the effect of a receivership is to take the property of a debtor completely out of his control and to stay the executions of creditors who are pursuing their legal rights, the chancery court will act only upon the showing of a strong equity in favor of those seeking the relief.[3]

Although the remedy is largely one granted at the discretion of the court, the law has developed some general rules to guide the court in the exercise of its discretion. Here, as in all cases, equity will not grant relief save as a measure in aid of the enforcement of some recognized equitable right. The plaintiff, therefore, must show: first, that he has a clear right to the property itself or some lien upon it, or that the property constitutes a special fund to which he has a right resort for the satisfaction of his claim; and secondly, that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant.[4] In order

[34]Newcomb *v.* Taxicab Co. (Ill. Pub. Utilities Comm. 1916) P. U. R. 1916 B 983; Brown *v.* New York Central etc., R. R. (1894) 75 Hun 355, 27 N. Y. Supp. 69.

[35]Terminal Taxicab Co. *v.* Dist. of Columbia, *supra.*

[36]Liverpool etc., Ins. Co. *v.* Kearney (1901) 180 U. S. 132, 21 Sup. Ct. 326; Paul *v.* Travelers Ins. Co. (1889) 112 N. Y. 472, 20 N. E. 347; Kratzenstein *v.* Western Assurance Co. (1889) 116 N. Y. 54, 22 N. E. 221; Marshall *v.* Com. Travelers' Mutual Accident Ass'n. (1902) 170 N. Y. 434, 63 N. E. 446; Schumacher *v.* G. E. C. & I. Co. (1909) 197 N. Y. 58, 90 N. E. 353; Primrose *v.* Casualty Co., *supra.*

[1]Dozier *v.* Logan (1897) 101 Ga. 173, 28 S. E. 612; Lancaster *v.* Asheville Street Ry. (C. C. 1898) 90 Fed. 129; see High, Receivers (4th ed.) § 3.

[2]Latham *v.* Chafee (C. C. 1881) 7 Fed. 525; Lancaster *v.* Asheville Street Ry., *supra*; see High, *op. cit.*, §§ 10, 11; 5 Pomeroy, Eq. Juris. (3rd ed.) §§ 64, 69.

[3]C. & A. Oil & Mining Co. *v.* U. S. Petroleum Co. (1868) 57 Pa. 83; Smiley *v.* Sioux Beet Syrup Co. (1904) 71 Neb. 581, 101 N. W. 253; see Pairpoint Mfg. Co. *v.* Watch Co. (1894) 161 Pa. 17, 28 Atl. 1003; see also Myers *v.* Myers (1897) 15 App. Div. 448, 44 N. Y. Supp. 513, where the court refused petitioning creditors the right to levy executions on property of insolvent firm in hands of receiver; and Abrahams *v.* Beneke (1913) 155 App. Div. 525, 140 N. Y. Supp. 753, where the court granted petitioning creditors the right to levy on property of solvent firm in hands of receiver.

[4]Mays *v.* Rose (Miss. 1844) Freem. Ch. 703; see 5 Pomeroy, *op. cit.*, § 64; High, *op. cit.*, § 11.

for him to do this, it is ordinarily essential that a suit be pending.[5] Moreover, if his right to the final relief sought in that suit is a matter of grave doubt, the appointment of a receiver should be refused.[6] This follows necessarily from the fact that the remedy of receivership is treated as an ancillary one, invoked as an adjunct or aid of the principal relief sought and never as the ultimate object of the action.[7]

In making out his case for relief, the plaintiff may demonstrate his legal or equitable right to the property by showing a special *res* to which in equity he has a right to resort,[8] or by showing a judgment and an execution returned *nulla bona*.[9] The suing out of execution is excused where the circumstances show that it would be an idle ceremony.[10] The failure to secure judgment and sue out execution is a matter of defense, in that the defendant may thus show that the plaintiff has failed to exhaust his remedies at law; it may be waived with the result that a simple contract creditor, by such waiver, stands as though the objection had never existed.[11] But this of itself will not necessarily entitle the plaintiff to the relief sought, for he must still, in order to make out a proper case for a receivership, show the necessity for summary relief. Failure to do this constitutes a jurisdictional defect, rendering the case an improper one and one where the court, even with

---

[5]Hutchinson *v.* American Palace Car Co. (C. C. 1900) 104 Fed. 182; see 5 Pomeroy, *op. cit.*, § 71; High, *op. cit.*, § 17. Cases which involve the estates of infants, Pitcher *v.* Helliar (1781) Dick. 580, or of lunatics, *In re* Pountain (1888) 37 Ch. D. 609; see *In re* Colvin (1851) 3 Md. Ch. 278, furnish exceptions to the general rule.

[6]Hamilton *v.* Accessory Transit Co. (N. Y. 1856) 3 Abb. Pr. 255; People *v.* Weigley (1895) 155 Ill. 491, 40 N. E. 300; Owen *v.* Homan (1851) 3 Mac. & G. 378, 412; see 5 Pomeroy, *op. cit.*, § 66; High, *op. cit.*, § 8.

[7]Vila *v.* Grand Island Electric etc., Co. (1903) 68 Neb. 222, 97 N. W. 613; State *v.* Ross (1894) 122 Mo. 435, 25 S. W. 947. Statutes in some states authorize the appointment of receivers for corporations which are insolvent or in imminent danger of insolvency when the receivership is the sole relief sought. Hall *v.* Nieukirk (1906) 12 Idaho 33, 85 Pac. 485; *In re* Lewis (1894) 52 Kan. 660, 35 Pac. 287; First Nat'l. Bank *v.* U. S. Encaustic Tile Co. (1886) 105 Ind. 227, 4 N. E. 846; but see State *v.* Union Nat'l. Bank (1896) 145 Ind. 537, 548, 44 N. E. 585. For a discussion and compilation of these statutes see 5 Pomeroy, *op. cit.*, § 127, n. 310.

[8]Case *v.* Beauregard (1879) 101 U. S. 688; Byrne *v.* First Nat'l. Bank (1899) 20 Tex. Civ. App. 194, 49 S. W. 706; see Regenstein *v.* Pearlstein (1888) 30 S. C. 192, 8 S. E. 850; Buck *v.* Stuben (1901) 63 Neb. 273, 88 N. W. 483.

[9]Stewart *v.* Fagan (C. C. 1876) Fed. Cas. No. 13,426; Bean *v.* Heron (1896) 65 Minn. 64, 67 N. W. 805; see Minklen *v.* U. S. Sheep Co. (1895) 4 N. D. 507, 62 N. W. 594; Stirlen *v.* Jewett (1897) 165 Ill. 410, 46 N. E. 259, where the facts showed that the execution was not *bona fide* but was brought about by collusion of the parties and the court dismissed the receiver. Since a chancery order to pay money, Aetna Nat'l. Bank *v.* Manhattan Life Ins. Co. (C. C. 1885) 24 Fed. 769, and a damage order, Lydecker *v.* Smith (N. Y. 1887) 44 Hun 454, were held equivalents of a judgment in cases where injunctions were sought, it seems probable that the same would be held in a case calling for the remedy of receivership.

[10]Cadogan *v.* Lyric Theater Ltd. [1894] 3 Ch. 338; see Case *v.* Beauregard, *supra*; Sage *v.* Memphis & Little Rock R. R. (1887) 125 U. S. 361, 376, 8 Sup. Ct. 887.

[11]*In re* Metropolitan Ry. Receivership (1907) 208 U. S. 90, 28 Sup. Ct. 219; see Hollins *v.* Brierfield Coal & Iron Co. (1893) 150 U. S. 371, 380, 14 Sup. Ct. 127; Sage *v.* Memphis & Little Rock R. R., *supra*.

the consent of the parties, has no authority to appoint a receiver.[12] If, however, the case is a proper one, the creditor at large and the debtor may, by agreement, secure the relief sought; and such an appointment is not subject to attack on the ground of collusion.[13] Nevertheless, granting a case where equity has jurisdiction, yet, if the record or conduct of the parties shows that the object is any other than liquidation, the court, in its discretion, will ordinarily refuse to appoint a receiver[14] and will, upon application, remove one if he has already been appointed.[15] This refusal to exercise jurisdiction is due to a commendable reluctance on the part of the courts to undertake the running of a business. The instances where the courts have departed from their general policy are few; they can be justified only on the ground that public interest demands the continued operation of a public utility.[16]

Whenever the suit is a friendly one between a creditor at large and a debtor, the court should scrutinize the bill most closely in order to make sure that the cause is one giving to the equity court jurisdiction, and not one, as is often the case, which has for its primary purpose the preservation of assets through a warding off of executions. "Receiverships are too often sought in order to accomplish under color of judicial process what is prohibited by the common law and by statutes against fraudulent conveyances; that is to say, for the purpose of delaying creditors".[17] An assignment for the benefit of creditors long ago came to be looked upon with suspicion. If the assignor reserved to himself any interest in the property, the assignment was held to hinder, delay and defraud creditors, and was void.[18] As a New York court expresses it: "The law gives the creditor a right to determine whether his debtor shall have further indulgence, or whether he shall pursue his remedy for the collection of the debt. The deferring of payment is generally an injury to the creditor; and he may become overwhelmed with bankruptcy for want of the fund which is locked up by the voluntary assignment of his debtor. It is mockery to such a creditor to say that the assignment is made for the benefit of creditors".[19] To-day such a general assignment is held to be an act of bankruptcy.[20]

---

[12]Hutchinson *v.* American Palace Car Co., *supra*; Vila *v.* Grand Island Electric etc., Co., *supra*; see Whelpley *v.* Erie Ry. (C. C. 1868) 6 Blatch. 271.

[13]See Glenn, Creditor's Rights, § 312 and cases cited in footnote 11, *supra.*

[14]Glenn, *op. cit.*, § 313; see Schloss *v.* Schloss (1897) 14 App. Div. 333, 43 N. Y. Supp. 788; *cf.*, Waters *v.* Taylor (1808) 15 Ves. Jr. 10, where a partner seeking a receivership for the firm was refused relief because the receivership was not sought for purposes of liquidation.

[15]Duncan *v.* Treadwell (1894) 82 Hun 376, 31 N. Y. Supp. 340.

[16]See *In re* Metropolitan Ry. Receivership, *supra*; Sage *v.* Memphis & Little Rock R. R., *supra*; Pennsylvania Steel Co. *v.* New York City Ry. (C. C. 1912) 198 Fed. 721, 737; Vila *v.* Grand Island Electric etc., Co., *supra.*

[17]*Per* Putnam, *J.*, in Hutchinson *v.* American Palace Car Co., *supra*, at p. 184.

[18]Gardner *v.* Commercial Nat'l. Bank (1880) 95 Ill. 298; Van Nest *v.* Yoe (N. Y. 1843) 1 Sandf. Ch. 4; Ward *v.* Trotter (Ky. 1825) 3 Mon. 1.

[19]Van Nest *v.* Yoe, *supra*, at p. 9.

[20]West Co. *v.* Lea (1899) 174 U. S. 590, 19 Sup. Ct. 836.

It would seem clear that an equity court should not lend its aid to the accomplishment through a receivership of a result which to all practical purposes renders ineffective the Bankruptcy Act, and which indirectly does the very thing which law condemns and pronounces void as a fraud on creditors. It is submitted, however, that such a result was effectuated by the county court in the recent case of *Thompson's Receivership* (1916) 44 Pa. C. C. 518. There, two unsecured creditors without judgments, obtained the appointment of a receiver in a friendly suit with the debtor. The plaintiffs showed no right to the property, no inadequacy of legal remedy and no necessity for summary relief, unless the fact that a debtor is unable to meet his obligations as they fall due, plus the hope that his condition with the aid of the court may at some time in the future be improved, is such a showing. The receivership was sought and granted avowedly for the purpose of staying executions and running the debtor's business pending the development of assets. Fortunately the Supreme Court of Pennsylvania reversed the decision, holding that the chancery court does not exist to aid in the accomplishment of any such object.

BURDEN OF ESTABLISHING WANT OF CONSIDERATION IN AN ACTION BETWEEN IMMEDIATE PARTIES TO NEGOTIABLE INSTRUMENTS.—If the common-law courts had assumed jurisdiction over causes of action involving mercantile obligations before the theory of consideration had come into the law, there might have been some basis for making such obligations subject to the rule requiring consideration. But such was not the fact.[1] Moreover, mercantile specialties at the time of their recognition by the common-law courts were binding of their own force[2] because the law merchant was not restricted in its enforcement of written instruments by any notion of consideration or *quid pro quo*. Therefore, the mere taking over of the law merchant by the common-law courts did not of itself furnish any reason for applying the doctrine of consideration to mercantile specialties. Furthermore, since the consequences flowing from the execution and delivery of a negotiable instrument have always been different from those flowing from a simple contract,[3] there was no real ground for subjecting the former class of obligations to the same rules as were applied to the latter. The writings of Lord Mansfield and Blackstone evidence the fact that the courts and authorities, at least for a time, recognized the soundness of this position.[4] However, as a result of *Rann* v. *Hughes*[5] negotiable instruments were placed in the same category as simple contracts, at

[1]The doctrine of consideration came into the law during the 16th century, Ames, Lectures on Legal History, c. 13, whereas the enforcement of the law merchant by common-law courts was not undertaken until the end of the 17th century. 1 Holdsworth, History of English Law, 333, 334.

[2]See Maylne, Lex Mercatoria, 74 *et seq.*, and 261; Marius, Bills of Exchange, *14; article by A. T. Carter in 17 Law Quarterly Rev. 232, at p. 242.

[3]2 Ames, Cases on Bills & Notes, 872-877; Langdell, Contracts (2nd ed.) 62 *et seq.*

[4]See 2 Bl. Comm., *446; Pillans & Rose *v.* Van Mierop & Hopkins (1765) 3 Burr. 1663.

[5](1778) 7 T. R. 350.